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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 459

RALPH O. BROWNFIELD, *Petitioner*

v.

TRUMAN H. LANDON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2-4
Summary of Reasons for Granting Writ	4
Reasons for Granting Writ	5-10
Conclusion	10
Appendix:	
Order of Judge Youngdahl	1a
Memorandum by Judge Matthews	1a
Order of Judge Matthews	1a-2a
Opinion of U. S. Court of Appeals	2a-10a

CITATIONS

Barr v. Matteo, 360 U.S. 564	2, 4, 5, 6, 7, 8
Gregoire v. Biddle, 360 U.S. 593	4, 5, 6
Howard v. Lyons, 177 F. 2d 579	4, 8
Spalding v. Vilas, 161 U.S. 483	5, 6

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Ralph O. Brownfield, by counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on June 28, 1962.

OPINIONS BELOW

The order of the United States District Court for the District of Columbia (Judge Youngdahl) denying respondent's first motion for summary judgment is reprinted in the Appendix hereto at page 1a. The Memorandum and Order of the District Court (Judge Matthews) granting respondent's second motion for summary judgment are found in the Appendix at page 1a-2a. The Opinion of the Court of Appeals, not yet reported, is reprinted in the Appendix at page 2a-10a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1962 (App., *infra*, p. 2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there is or should be an absolute privilege in the Inspector General of the United States Air Force to say within the hearing of others that petitioner "is guilty as hell" and "should wind up in the penitentiary".

2. Assuming that the absolute privilege doctrine of *Barr* v. *Matteo*, 360 U.S. 564, is applicable to such statements, slanderous *per se*, does the record herein present clear, uncontroverted evidence that the slanderous statements were made in connection with actions "within the outer perimeter of [respondent's] line of duty", as required by *Barr* v. *Matteo* and a motion for summary judgment.

STATEMENT

Petitioner, a retired United States Air Force officer, alleged in his complaint that on October 13, 1955, respondent, then Inspector General of the Air Force, told a United States Congressman and a private citizen that, among other things of a slanderous nature, petitioner "is guilty as hell" and "should wind up in the penitentiary" (J.A. 3).*

The Office of the Inspector General had supervision over the then Directorate of the Office of Special Investigations (O.S.I.) (J.A. 20). The O.S.I. had, in

* The Court of Appeals Record, Joint Appendix, is referred to as J.A.

May of 1955, started an investigation of the aforesaid private citizen, petitioner and others on Air Force procurement matters (J.A. 31). The private citizen had been told that in July of 1955 a corporation owned by him which had Air Force contracts had been put on a Debarred Bidders List as a result of the investigation.

On the first of August of 1955, pursuant to an agreement with the Department of Justice, the Department of the Air Force had turned the results of the investigation over to Justice which had elected to assume control of the case and had sent the entire file to the proper United States Attorney (J.A. 32, 125). The U. S. Attorney was told that if he needed to have further investigatory work done he could contact the Judge Advocate General of the Air Force, who would have it done (J.A. 126). Three days after Justice took control, respondent, as Inspector General, received his last report on the case from the O.S.I. (J.A. 97). Furthermore, the Department of the Air Force thereafter referred "all requests for information relative to the matter under investigation . . . to the Department of Justice as the Department of Justice had complete control over the case" (J.A. 33).

On October 13, 1955, the Congressman and the private citizen, without the knowledge of petitioner, met with respondent in his office and sought to have the corporation removed from the Debarred Bidders List (J.A. 63). It is not clear in the record how the conference was scheduled, but it is clear that in this conference the respondent, without provocation, uttered the slanderous remarks about petitioner.

Respondent moved for summary judgment, which motion petitioner opposed on the ground that genuine

issues as to material facts existed. The material reprinted in the Joint Appendix on pages 7 to 33 was before the Court as exhibits attached to the pleadings. Judge Youngdahl, on June 3, 1960, denied the motion on the ground that "there exist material facts which are in dispute, particularly those concerning the circumstances under which the defendant made the alleged defamatory statements" (J.A. 33-34). Thereafter, respondent answered, several depositions were taken and filed, and respondent again moved for summary judgment. Petitioner again opposed the motion on the grounds that Judge Youngdahl's decision was the law of the case and that genuine issues as to material facts still existed. The material printed in the Joint Appendix on pages 34 to 127 had been added to the record but did nothing to resolve the dispute "concerning the circumstances under which the defendant made the alleged defamatory statements". Judge Matthews granted respondent's motion for summary judgment on the authority of *Barr* v. *Matteo, supra; Howard* v. *Lyons,* 360 U.S. 593; and *Gregoire* v. *Biddle,* 177 F.2d 579.

The Court of Appeals affirmed on June 28, 1962, on the authority of *Barr* v. *Matteo* and *Howard* v. *Lyons.*

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. *Barr* v. *Matteo* should be reexamined and overruled or modified.

2. The Court of Appeals has extended the doctrine of absolute privilege beyond the limits set and to a degree not contemplated by this Court in *Barr* v. *Matteo.*

3. The decision below in this case disregarded two well established legal principles.

REASONS FOR GRANTING THE WRIT

I. BARR v. MATTEO SHOULD BE REEXAMINED AND OVERRULED OR MODIFIED.

A. Barr v. Matteo Should be Overruled

In *Barr* v. *Matteo*, the agency, of which Mr. Barr was the acting director, had been under attack by various critics because of the use of a novel plan for the utilization of certain agency funds. In defense, Mr. Barr issued a press release. A jury found it was false and defamatory as to the two persons named in it and awarded them damages. This Court reversed the Court of Appeals and held that Mr. Barr was cloaked with an absolute privilege which rendered the plaintiffs' proven claims for damages useless. That decision was bottomed on the principle "that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties", citing *Gregoire* v. *Biddle, supra.* The only guidelines as to what is *duty* were expressed in the principal opinion of Mr. Justice Harlan, joined in by Justices Frankfurter, Clark and Whittaker, as: "matters committed by law to his control or supervision" (from *Spalding* v. *Vilas,* 161 U.S. 483), and "the action . . . [is] within the outer perimeter of [the government official's] line of duty". Mr. Justice Black concurred in the reversal "for not altogether the same" reasons. Our principal reasons for concluding that that decision merits reexamination by this Court are best set forth in the dissenting opinion filed by Mr. Chief Justice Warren, in which Mr. Justice Douglas joined, and the dissents of Mr. Justice Brennan and Mr. Justice Stewart.

There is another reason, not expressed in the dissenting opinions, why the *Barr* v. *Matteo* doctrine

should be overruled. A principle alien to the ancient cause of action for defamation was used to resolve a defamation issue, thereby causing the clear distinction between *words* and *acts* to be lost, temporarily at least, but certainly during the pendency of the case at bar. *Gregoire* v. *Biddle* involved a suit for false arrest and imprisonment, an *act* of a government official. As noted above, *Barr* v. *Matteo* is fastened to the principle that government officials should be unembarrassed by the fear of suits "in respect of *acts* done in the course" of their duties (Emphasis added). The principal opinion in *Barr* v. *Matteo* speaks of "*action* . . . within the outer perimeter" (Emphasis added). The gravamen of the cause of action for defamation is not that the defendant performed some *act*, but that defendant despoiled the plaintiff's good name and reputation by using certain *words*, either orally or in writing. For example, Mr. Barr may have had the right to issue a press release telling that he would suspend the named individuals but he had no right to use defamatory words; he had no right to castigate. Assuming, *arguendo*, in the instant case, that General Landon was acting within the "outer perimeter" of his duties in discussing petitioner's involvement in the investigation with the Congressman and the private citizen, he had no right to use words which are universally considered to be slanderous *per se*.

The other case upon which the principal opinion in *Barr* relied heavily is *Spalding* v. *Vilas*, *supra*, but as was pointed out by Mr. Justice Brennan in footnote 3 to his dissenting opinion, there is strong doubt that this was a defamation case.

Barr v. *Matteo* may be a proper formula to protect a government officer for his *actions*, i.e., false arrest

and imprisonment, but it is wholly inconsistent with the original legal theory supporting the cause of action for defamation. It should be overruled.

B. If Not Overruled, Barr v. Matteo Should be Modified

In *Barr* v. *Matteo,* the jury had to determine that the words were defamatory. The instant case involves slander *per se.* A jury would have only to decide whether the words were spoken; they would not need to inquire into respondent's motives. Assuming that the *Barr* v. *Matteo* doctrine is correct for a "Barr" type case, it is not correct when the defendant utters words, without provocation, which are slanderous *per se.* If this can be read into the *Barr* v. *Matteo* decision, that decision needs modification. Surely this Court did not mean to abolish a right of redress for a wrong as clearly mischievous as slander *per se.* Surely this Court did not intend to lay down the rule that a military man may with impunity usurp the prerogative of the courts to pronounce a man guilty.

Barr v. *Matteo,* if not overruled, should be modified for another reason—the reason expressed by Mr. Chief Justice Warren—that the standard it sets up is too vague. The principal opinion leaves only confusion as to what is inside and what is outside the "outer perimeter". Mr. Justice Stewart's dissent gives emphasis to this and the Attorney General of the United States recognized immediately that the decision did not give specific guidance on that aspect of the doctrine. In a memorandum issued to all heads of departments two weeks after the Barr decision was handed down, Attorney General Rogers said:

> "As to the extent and limitations of the privilege, although referred to as an 'absolute privilege', it

applies *only* to statements made in the course of the exercise of the duties of the office. The privilege does not apply to defamatory statements unrelated to official duties. Furthermore, there may be a close question as to whether a statement is in the line of duty of the office within the meaning of the decisions. (See dissent by Justice Stewart in the *Barr* case.)"

2. THE COURT OF APPEALS HAS EXTENDED THE DOCTRINE OF ABSOLUTE PRIVILEGE BEYOND THE LIMITS SET AND TO A DEGREE NOT CONTEMPLATED BY THIS COURT IN BARR v. MATTEO.

Respondent was not an "official of policy-making rank". Respondent was not an "agency head, announcing personnel action which he planned to take in reference to charges widely disseminated to the public." His powers, duties and functions were specifically spelled out in Air Force Regulation No. 20-68. (J.A. 19-23). His functions at best were to investigate, report and recommend to his superiors. He had no authority to sit in judgment. He was without power to judge. He had neither duty nor authority to report directly to the public. Inspectors General do not issue press releases. He was without power to discipline, to fire, or to take personnel action affecting petitioner. A determination as to guilt or innocence lay with the courts or a court martial. The application by the Court of Appeals of *Barr* v. *Matteo* and *Howard* v. *Lyons* to the instant case extended the rule of those cases beyond the limits set and to a degree not contemplated by this Court. The Court has obviously extended the privilege to the "title of the office". *Barr* v. *Matteo* expressly disclaimed an intent to do this.

3. THE DECISION BELOW IN THIS CASE DISREGARDED TWO WELL ESTABLISHED LEGAL PRINCIPLES.

A. A genuine issue existed as to the material fact of whether, on October 13, 1955, respondent had any control over the case or supervisory control over the investigation. It may be granted that he did have supervisory control of the investigation from its inception in May of 1955 to August of the same year when jurisdiction and control were transferred to and assumed by the Department of Justice. The "entire matter was referred to the Department of Justice in August of 1955" by the Air Force (J.A. 32). Only respondent and some attorney in the Department of Justice have said to the contrary (J.A. 12, 100). The last report respondent, as Inspector General, received about the case was a memorandum dated 4 August 1955 informing him that the "Air Force was, in agreement with established procedures, referring the matter to the Department of Justice for their consideration" (J.A. 97-99). The opinion below summarily dismissed the argument that genuine issues existed by saying "the whole interview had reference to a matter under the jurisdiction of General Landon"—no rhyme, no reason.

B. When Judge Youngdahl denied the first motion for summary judgment, it established the law of the case. This should not have been overruled by Judge Matthews unless defendant produced evidence sufficiently compelling as to eliminate the issues of fact which Judge Youngdahl had found to exist. Although there was a "different and expanded record", as the Court of Appeals said (App. p. 10a), it is significant that that Court did not bother to point out what it was that was before the second court on the issue of

"outer perimeter" of respondent's duties that was not before the first court and which foreclosed argument as to the existence of an issue.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Date: September 25, 1962